*United States Government*
***National Labor Relations Board***
**OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

S.A.M. DATE: January16, 2015

TO: Olivia Garcia, Regional Director
Region 21

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Millennium Reinforcing, Inc. Remedies/Compliance
Case 21-CA-112190

This matter is presented for consideration of whether this case is an appropriate vehicle to urge the Board to overrule its decision in *Oil Capitol Sheet Metal,*[1] which, for remedial purposes, eliminated the presumption of continued employment for a "salt" discriminatee and made it the burden of the General Counsel to prove that the "salt" discriminatee would have continued working for the employer. We believe *Oil Capitol* should be overruled, and that this is an appropriate vehicle to urge the Board to do so. Accordingly, the Region should issue a consolidated complaint and compliance specification in this matter, absent settlement, and urge the Board to reconsider its decision in *Oil Capitol* and return to the allocation of evidentiary burdens set forth in *Dean General Contractors.*[2]

## FACTS

The Employer, Millennium Reinforcing, Inc., is engaged in construction work, including rebar work, at several jobsites in California. The Union, the Iron Workers of California, is conducting an organizing campaign to represent the Employer's employees at various sites in San Diego, Los Angeles and San Jose. The relevant three jobsites in San Diego are (1) Kettner and Juniper, (2) 10th and J, and (3) 13th and Market.

On June 25, 2013,[3] as part of a coordinated Union salting campaign, the two discriminatees applied for work with the Employer. The two discriminatees are

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[1] 349 NLRB 1348 (2007), *petition for review dismissed sub nom. Sheet Metal Workers Local 270 v. NLRB*, 561 F.3d 497 (D.C. Cir. 2009).

[2] 285 NLRB 573 (1987).

[3] All dates hereinafter are in 2013, unless otherwise stated.

(b) (6), (b) (7)(C) and members in good standing with the Union, but are not paid organizers. The Union does, however, supplement their wages so that they won't suffer losses by working for a nonunion employer in order to engage in salting activity. On (b) (6), (b) (7)(C) the Employer hired them for iron rebar work. On July 1, they began work at the 13th and Market Street jobsite in San Diego. After four hours, the Employer transferred them to the 10th and J Street jobsite, where they continued to do reinforcing rebar work for about two weeks.

At about 6:30 a.m., on July 11, the job (b) (6), (b) (7)(C) observed the discriminatees handing Union pamphlets to six workers and talking to them about the Union. At around 9:45 a.m., the discriminatees informed their (b) (6), (b) (7)(C) that they were organizers for Local 229 and that they were there to represent the workers. At some point, the discriminatees stopped work for about 30-40 minutes, announcing that they were on strike.[4] Their (b) (6), (b) (7)(C) gave them a choice — work or sign out. They chose to continue to work, but they also continued talking to co-workers about the Union. Later that morning, the (b) (6), (b) (7)(C) directed the two discriminatees to go to the other side of the jobsite and clean up all of the scrap metal, work generally reserved for apprentices. Sometime before noon, the Employer's (b) (6), (b) (7)(C) approached them and asked what was going on. One of them told (b) (6), (b) (7)(C) they were organizers for Local 229 and trying to obtain better benefits for the workers and better pay. The (b) (6), (b) (7)(C) offered them individually a $2 per hour pay increase, but the discriminatees rejected the offer.

The discriminatees reported to work on Friday, July 12, and continued to talk to their co-workers about the Union. The (b) (6), (b) (7)(C) told a (b) (6), (b) (7)(C) to keep an eye on one of the discriminatees, further stating that if that discriminatee was not working or doing what (b) (6), (b) was supposed to be doing, the Employer would fire (b) (6), (b) (7)(C) The (b) (6), (b) (7)(C) videotaped that discriminatee's work in the morning. That same day, as the (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) picketed outside the Employer's 10th and J Street jobsite, (b) (6), (b) heard the Employer's (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) talking about discharging the discriminatees for insubordination. The (b) (6), (b) (7)(C) said that would be unnecessary as one had already failed to show up for scheduled work without calling and could be discharged for that reason. At the end of work that day, the (b) (6), (b) (7)(C) informed one of the discriminatees that it was winding down and did not have enough work for either discriminatee. The (b) (6), (b) (7)(C) told the discriminatee (b) (6), (b) needed to call the office about work on Monday, July 15. The discriminatee called the office after (b) (6), (b) left the jobsite. That call was not returned.

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[4] The two had spoken to the (b) (6), (b) (7)(C) about the timing of the strike beforehand.

On Monday, July 15, one of the discriminatees called the Employer's (b) (6), (b) (7)(C) and asked whether the Employer had any work for them. The (b) (6), (b) (7)(C) said things were slow, [redacted] did not have any work for them, and they could file for unemployment compensation because they had been laid off for lack of work.

The Employer asserted that it concluded that it only needed 17 of the then 19 employees for the remaining work at the 10th and J Street jobsite, and therefore it laid off the discriminatees. The Employer first asserted that it chose the two discriminatees for layoff because they were the slowest workers. The Employer later asserted that it had a last-in, first-out policy and that was the reason for their layoff. Work remaining to be done at the 10th and J Street jobsite after the discriminatees were laid off included uncompleted floors, cables to be run, and walls requiring rebar work. Work at the 13th and Market Street job ended on or about January 10, 2014. The Employer typically transfers employees from jobsite to jobsite and hired (b) (6), (b) (7)(C) from late July through November.

The discriminatees assert they had no specific understanding with the Union prior to going to work with the Employer as to the length of their "assignment." Neither was told by the Union that the Union would determine the length of their employment, and both [redacted] needed work and would have worked as long as possible for the Employer. The Union never utilized written salting agreements but had verbal agreements with the discriminatees that — consistent with contemporaneous Union policy and practices — required them to (1) agree to work for a non-union contractor and follow the work wherever it went — out of state or out of the city — until the company said there was no more work; (2) develop relationships with other employees; (3) do a good job for the company; (4) only talk about the Union before work, during breaks, during lunch and after work; (5) learn about the family issues faced by workers; and (6) come out with their Union support and affiliation at a time when support seemed to have gathered strength within the company. The Union's specific plans for this Employer centered around addressing its low wages, lack of proper overtime pay, inadequate safety training and OSHA violations. Union salting campaigns would last for a couple of days to up to three months. As noted above, the discriminatees would have continued to work for the Employer up to the present time and desire reinstatement.

The Region concluded that the two discriminatees were unlawfully laid off because of their union activity, and were discriminatorily assigned to clean up scrap metal and iron. The Region believes it can meet its burden of proof under *Oil Capitol*, and show that the discriminatees would have continued their employment with the Employer and should be reinstated with back pay.

## ACTION

We conclude that the Region should issue a consolidated complaint and compliance specification in this matter and assuming that the violations are proven, it should then argue in the compliance portion of the proceeding that under *Oil Capitol* these discriminatees would have worked for the entire length of the specification up to their reinstatement. The Region should also request that the Board reconsider its decision in *Oil Capitol* and return to the allocation of evidentiary burdens set forth in *Dean General Contractors.*[5]

In *Dean General Contractors*, the Board held that traditional make-whole remedies and a presumption of continued employment would apply in the construction industry despite employment patterns in that industry.[6] A respondent can rebut the presumption of continued employment by proving in compliance that it would not have transferred or reassigned the discriminatee after completion of the project at issue.[7]

In *Oil Capitol*, the Board rejected the rebuttable presumption of continued employment in the construction industry for salts and announced a rule requiring the General Counsel to produce affirmative evidence that a salt discriminatee would have worked for a respondent for the backpay period claimed in the compliance specification.[8] Furthermore, the Board ruled that if the General Counsel cannot prove that a salt discriminatee would have stayed at a job indefinitely, the discriminatee is not entitled to instatement or reinstatement.[9] The Board specified the following five factors as relevant to proving the length of a salting discriminatee's backpay period: (1) the discriminatee's personal circumstances during the backpay period; (2) union policies and practices with respect to other salting campaigns at the time of the discrimination; (3) specific union plans for the targeted employer; (4) instructions or agreements between the discriminatees and the union concerning the anticipated duration of the assignment; and (5) historical data regarding the duration of

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[5] 285 NLRB 573 (1987).

[6] *Id.* at 573-575.

[7] *Id.* at 575.

[8] 349 NLRB at 1349.

[9] *Id.* at 1354.

employment of the discriminatees and other discriminatees in similar organizing campaigns by the same union.[10]

The Region should urge the Board to overrule *Oil Capitol* for the following reasons, First, by reversing the burdens of proof in *Oil Capitol* so that the General Counsel must demonstrate that the salt discriminatee would have continued to work for the offending employer, the Board undermined the effectiveness of established remedial policies and violated the well-established principle that any remedial uncertainty is resolved against the wrongdoer.[11] Second, in so doing, the Board created a disfavored class of statutory employees, notwithstanding the Supreme Court's ruling in *Town & Country Electric, Inc.*[12] that even paid union salts are protected employees under the Act. Finally, the Board made this significant change in its nearly 30 year old policy, which had never been rejected by any appellate court, without either party having raised it, without the benefit of briefing on the issue,[13] and therefore, without the benefit of any empirical evidence or legal support for any of its conclusions, including its primary conclusion that a salt's intention is to stay on the job "only until the union's defined objectives have been achieved or abandoned."[14]

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[10] *Id.* at 1349.

[11] *See, e.g., Bigelow v. RKO Radio Pictures,* 327 U.S. 251, 265 (1946) (the "most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created"). *See also*, *Tualatin Electric, Inc. v. NLRB,* 253 F.3d 714, 718 (D.C. Cir. 2001) ("The principle that the party who acted unlawfully should bear the burden of producing evidence for the purpose of limiting its damages has as much force in a case involving salts as in any other.").

[12] 516 U.S. 85, 94-95, 98 (1995).

[13] The majority decision in *Oil Capitol Sheet Metal* cites to *Indian Hills Care Center,* 321 NLRB 144 (1996) as support for its unilateral action. 349 NLRB at 1353. However, as noted by the *Oil Capitol* dissent, *Indian Hills* dealt only with a respondent's ministerial acts regarding the time for compliance with Board orders, and not a wholesale "policy-driven reversal of precedent, which erects new obstacles to remedies for an entire class of discriminatees." 349 NLRB at 1358 n.12.

[14] *Oil Capitol Sheet Metal,* 349 NLRB at 1349 & 1351.

1. The Board's decision in *Oil Capitol* is contrary to well-established remedial principles.

Traditionally, the remedy in a Section 8(a)(3) termination or failure to hire case is a full make-whole remedy, consisting of reinstatement/instatement with backpay from the time of the unlawful discharge or refusal to hire until the employer extends an offer of employment.[15] The reinstatement/instatement remedies assure protection of the most fundamental of all § 7 rights — "the right of self-organization."[16]

Importantly, the majority approach in *Oil Capitol* frustrates that fundamental statutory purpose, since it may foreclose any remedy of reinstatement or instatement, absent the General Counsel proving that the salt discriminatee would have continued to work but for the unlawful discharge or unlawful refusal to hire. Reinstatement of a discriminatorily discharged employee or in the case of an unlawful refusal to hire, instatement, may not be a necessary remedy to make an employee whole for his monetary loses, but as the Supreme Court held in *Phelps Dodge* "to limit the significance of discrimination merely to questions of monetary loss to workers would thwart the central purpose of the Act, directed as that is toward the achievement and maintenance of workers' self-organization."[17] This principle is most significant in the case of salts because they seek employment for the express purpose of helping organize their fellow workers. The *Oil Capitol* Board's approach may effectively stymie organizational efforts of employees by enabling an employer to successfully ban the union activist from its worksite for the express purpose of preventing unionization. As the *Phelps Dodge* court noted, "[d]iscrimination against union labor in the hiring of men is a dam to self organization at the source of supply."[18]

Moreover, as a result of *Oil Capitol,* the employer will accomplish this at the risk of only a minimal backpay liability. Thus, by reversing the burden of proof for establishing that the salt discriminatee would have continued to work for the offending employer during the backpay period, the Board disregarded the well-established principle that "the wrongdoer shall bear the risk of the uncertainty which

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[15] *See* Section 10(c), 29 U.S.C. 160 §10(c); *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 194 (1941) (the full make whole remedy includes "not only compensation for loss of wages but also offers of employment to victims of discrimination.").

[16] *Phelps Dodge,* 313 U.S. at 195.

[17] *Id at* 193.

[18] *Id.* at 185.

his own wrong has created."[19] The D.C. Circuit, in expressly rejecting an employer's argument that the *Dean General Contractors* presumption should not be applied to salts, held that "the principle that the party who has acted unlawfully should bear the burden of producing evidence for the purpose of limiting its damages has as much force in a case involving salts as in any other."[20]

In sum, the *Oil Capitol* approach reduces the monetary risk to the employer of ridding itself of union activists by unlawful means, with the hope of forever foreclosing a reinstatement or instatement remedy, thereby permanently dashing any organizing efforts of its employees. This resulting departure from traditional remedial principles should not stand.

2. *Oil Capitol* fosters rather than prevents discrimination against salts and interferes with an organizing tool that the Supreme Court has implicitly found protected.

The *Oil Capitol* decision cannot be squared with the Supreme Court's decision in *Town & Country Electric*[21] that even *paid* union salts are employees protected under the Act. In *Town & Country Electric,* the Court upheld the Board's interpretation of the term "employee" to include salts as "consistent with several of the Act's purposes, such as protecting 'the right of employees to organize for mutual aid without employer interference[.]'"[22] In so doing, the Court implicitly recognized salting as a protected organizing tool. Yet, by recasting the evidentiary presumptions for remedying unlawful discrimination again salt discriminatees in *Oil Capitol,* the Board in effect interferes with that protected activity. Applying different evidentiary burdens in compliance cases involving salt discriminatees because they may abandon the employer ultimately fosters unlawful discrimination against them because any discriminatee may decide to leave a particular employer, for a whole host of reasons. Indeed, the Supreme Court observed that although a salt might quit, "so too might…a worker who has found a better job, or one whose family wants to move elsewhere."[23]

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[19] *Bigelow v. RKO Radio Pictures,* 327 U.S. at 265.

[20] *Tualatin Electric, Inc. v. NLRB,* 253 F.3d at 718.

[21] 516 U.S. at 94-96, 98 (1995).

[22] *Id.* at 90, quoting *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 798 (1945).

[23] *Id.* at 96.

Moreover, the Board's imprecision in defining who might be a salt, and including under this rubric both paid and unpaid salts, sweeps in a vast number of potential discriminatees for whom this evidentiary burden may well result in an amount of backpay that does not represent the full amount of monetary damages unlawfully caused by an offending employer. Thus, the new rule announced in *Oil Capitol* defines a "salt" as "those individuals, paid or unpaid, who apply for work with a nonunion employer in furtherance of a salting campaign[,]" and "salting" as the "act of a trade union in sending in a union member or members to an unorganized jobsite to obtain employment and then organize the employees."[24] The rationale for this rule as it applies to an unpaid salt discriminatee is far more tenuous because it is unlikely the union would ask such an individual to leave gainful employment even at the end of a campaign that it has abandoned, or that an unpaid salt would leave if asked to.[25] And, if the union should win the campaign and create a unionized workplace, the rule's logic fails completely because an unpaid salt may well to decide to work at such a facility indefinitely.

Moreover, determining whether a discriminatee that is not on the union's payroll is in fact a "salt" under the *Oil Capitol* definition will not always be simple. For example, employees who are hired after a "salting campaign" starts but who later support it, are presumably not included under the definition, but their statuses will likely be litigated owing to an employer's incentive to truncate the backpay period. The same circumstances exist with an employee who simply on his own initiative begins an organizing campaign by contacting a union. Virtually every union-affiliated discriminatee in every organizing drive case in the building and construction industry is subject to a challenge by an employer that he/she was a salt, frustrating the important statutory imperatives concerning workers' self-organization.

3. The Board's decision in *Oil Capitol* had no evidentiary or legal basis.

In *Oil Capitol* the Board basically relied on four specific cases for its proposition that salts never intend to remain with the Employer permanently.[26] None of those

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[24] *Oil Capitol Sheet Metal,* 349 NLRB at 1348 n.5.

[25] The *Oil Capitol* majority asserts that the union controls the unpaid salt because he or she is still subject to the union's disciplinary rules. 349 NLRB 1349 n.6. However, as the dissent observed, "union members are free to resign from the union, and to avoid discipline, at any time. *Pattern Makers League of North America v. NLRB*, 473 U.S. 95, 100 (1985)." 349 NLRB at 1362 n.31.

[26] *See* 349 NLRB at 1351-52, nn.12 & 13, citing *Hartman Brothers Heating & Air Conditioning v. NLRB,* 280 F.3d 1110, 1111 (7th Cir. 2002) (court enforced Board

cases cite "any evidence that salts usually, let alone uniformly, quit at the end of every organizing campaign, or that unions typically know in advance how long a particular campaign will last."[27] The decision does not otherwise cite to scholarly studies or empirical data that would support the proposition that salts generally abandon their employment. And indeed, there is evidence that salting campaigns vary dramatically in duration and can last from several months to several years.[28] Thus, beyond the majority's self-selection of cases, the *Oil Capitol* Board's supposition that salts generally abandon their employment, the primary reason for changing the existing evidentiary burdens, was wholly unsupported in the *Oil Capitol* record.

Nor was there any evidentiary support for the conclusion that unions are in a superior position to provide evidence relevant to what the expected duration of a salt discriminatee's employment would have been absent the unlawful discrimination. There is uncertainty with regard to the length of time that any discriminatee would have worked absent a discriminatory refusal to hire or discriminatory discharge precisely because of the employer's unlawful action. There is no empirical evidence that unions devise pre-determined ending dates for campaigns unrelated to the factual circumstances that unfold in any individual campaign. Absent such a pre-

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order of backpay for salt even where salt may have lied on employment application and in dictum observed, without authority, that "salts do not intend to remain in the company's employ after the plant or other facility is organized"); *American Residential Services of Indiana,* 345 NLRB 995, 996-997 (2005) (finding only that apprentice program that required third-year electricians to take six months off to engage in union organizing was a legitimate reason for an employer to deny employment to an alleged discriminatee based on a nondiscriminatory lack of availability); *Aneco, Inc.,* 333 NLRB 691, 694 (2001), *petition for rev. granted in part, denied in part and remanded,* 285 F.3d 326 (4th Cir. 2002) (union policy "*at times*" contemplated "it would be advantageous for salts already employed by a non-unionized company, to leave their employment with that company.") (emphasis added); and *Allied Mechanical Services,* 346 NLRB 326, 326-329 (2006) (examples of three salts who went on strike within a few weeks of being hired).

[27] *Oil Capitol*, 349 NLRB at 1359 (Members Liebman and Walsh, dissenting).

[28] *See, e.g., Tambe Electric, Inc.,* 346 NLRB 380, 383 (2006) (5 years); *Aztech Electric Co,* 335 NLRB 260 (2001), *enfd. in part,* 323 F.3d 1051 (D.C. Cir. 2003) (3 years); *WestPac Electric*, 321 NLRB 1322, 1327 (1996) (8 months).

determined ending date, "[t]he fact of discrimination makes it impossible to know how long a salting campaign would have progressed, absent the discrimination…."[29]

Lastly, there is no support for the *Oil Capitol* majority's conclusion that application of the *Dean General Contractors* presumption of continued employment in cases involving unlawful discrimination against salts results in backpay awards for speculative consequences of the unfair labor practices, with such awards amounting to punitive sanctions.[30] As the dissent pointed out, "the Board and courts have recognized that all backpay awards are necessarily 'approximations.'"[31] And the Supreme Court has held that backpay—specifically authorized under Section 10(c) of the Act—is not punitive but rather a compensatory make-whole remedy.[32] As noted above, allocating the burden of proof to the employer who creates the uncertainty by its unlawful act is not punitive but is simply a matter of equity. Every employer, including those in the building and construction industry, has a right to submit evidence to mitigate its backpay liability. In these circumstances, it is not punitive to allocate the burden of proof against the employer, who as the wrongdoer creates uncertainty, as opposed to the union, who has engaged in no wrongdoing, and at the expense of the discriminatee, who as a Section 2(3) employee is entitled to protection under the Act.

Accordingly, the Region should issue a consolidated complaint and compliance specification for reinstatement and backpay under the current *Oil Capitol* standards. At the compliance stage, the Region should urge that the Board overturn *Oil Capitol* for the reasons stated herein.

/s/
B.J.K.

H:ADV.21-CA-112190.Response.Millenium2 (b) (6), (b) (7)(C)

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[29] *Oil Capitol Sheet Metal,* 349 NLRB at 1360 n. 22 (Members Liebman and Walsh, dissenting).

[30] *See id.* at 1351-52.

[31] *Id.* at 1361 (Members Liebman, and Walsh, dissenting), citing to *NLRB* v. *Ferguson Electric Co., Inc.,* 242 F.3d 426, 431 (2nd Cir. 2001), *Glens Trucking Co.,* 344 NLRB 377, 380 (2005).

[32] *See NLRB v. Strong,* 393 U.S. 357, 359 (1969) (upholding Board order directing employer to pay fringe benefits that were required under collective-bargaining agreement negotiated on its behalf).